

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARY GARZA,

Plaintiff,

v.

CITY OF YAKIMA,

Defendant.

NO: 13-CV-3031-TOR

ORDER GRANTING IN PART
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

BEFORE THE COURT is Defendant's Motion for Summary Judgment (ECF No. 50). This matter was heard with telephonic oral argument on May 15, 2014. James E. Davis appeared on behalf of the Plaintiff. Mark D. Watson appeared on behalf of Defendant. The Court has reviewed the briefing and the record and files herein, and is fully informed.

BACKGROUND

This case concerns Plaintiff's allegations that his employer discriminated against him in violation of federal and state law, and breached promises of specific

1 treatment contained in the employee handbook. Defendant moves for summary
2 judgment on certain of Plaintiff's claims on grounds that some are time barred, that
3 some are barred because they were not part of the tort claim filed with the city, and
4 that others are barred because Plaintiff failed to timely file an EEOC claim
5 describing the Title VII claims asserted.

6 FACTS¹

7 Plaintiff Gary Garza is a police officer for the City of Yakima who alleges
8 that he was subjected to repeated acts of workplace discrimination and retaliation
9 for his participation in anti-discriminatory acts.

10 On April 4, 2012, Garza signed an EEOC Intake Questionnaire which was
11 received by the EEOC on April 9, 2012. On May 14, 2012, he signed an EEOC
12 Charge of Discrimination. In his EEOC complaint, he alleged multiple incidences
13 of discrimination and retaliation, occurring over an extended period of time. On
14 January 14, 2013, Garza filed a City of Yakima Tort Claim Form with the Yakima
15 City Clerk. ECF No. 59 at 32.

16
17 ¹ The Court has made no factual findings at this stage, but rather is reciting the
18 allegations of the parties. *See Tolan v. Cotton*, ---U.S.---, 134 S.Ct. 1861 (2014)
19 ([I]n ruling on a motion for summary judgment, "[t]he evidence of the nonmovant
20 is to be believed, and all justifiable inferences are to be drawn in his favor.").

1 Garza subsequently sued his employer, the City of Yakima, for unlawful
2 discrimination and retaliation in violation of Title VII of the Civil Rights Act and
3 the Washington Law Against Discrimination. ECF No. 2 at 1. In his amended
4 complaint, Plaintiff cites the actions of other employees of the City of Yakima,
5 including Officer Ryan Wisner, Sergeant Jay Seely, Lieutenant Tom Foley,
6 Captain Jeff Schneider, Lieutenant Mike Merryman, Lieutenant Gary Belles,
7 Captain Greg Copeland, and former city manager Richard Zais. ECF No. 2 at 3.
8 Plaintiff alleges, *inter alia*, that Captain Copeland has displayed animus toward
9 Garza since Garza's participation in an arbitration proceeding that overturned a
10 disciplinary action against him and a lawsuit involving nonpayment of overtime
11 wages. ECF No. 2 at 4. Plaintiff also alleges that ever since his 2000 testimony at a
12 hearing regarding racial profiling and race discrimination, he has been the subject
13 of adverse treatment by superior officers at the Yakima Police Department.

14 Defendant here moves for partial summary judgment on some of Plaintiff's
15 allegations. For the purposes of this motion, Defendant categorizes factual
16 allegations as "claims" and labels them as follows:

17 Claim A: "Accusation of Lying Claim" against Copeland which occurred at
18 least by 2008.

19 Claim B: "1999 Evaluation Claim" over a 2000 refusal by Copeland to
20 remove a "needs improvement" comment from Garza's evaluation which
was the subject of a grievance and resulting 2000 arbitration award.

1 Claim C: "Exclusion from 2001 and 2002 Narcotics Unit Claim" for
2 Copeland purposely and intentionally excluding Garza from consideration
for a Narcotics Unit position in 2001 and 2002.

3 Claim D: "2008 Narcotics Unit Claim" for Copeland purposely and
4 intentionally attempting to exclude Garza from consideration for a Narcotics
Unit position in 2008.

5 Claim E: "2008 Wrong Interview Scores Claim" for Copeland purposely and
6 intentionally submitting wrong oral interview scores for Garza in 2008 for
placement within the Narcotics Unit.

7 Claim F: "2011 Copeland Denial of Grievance Claim" for Copeland stating
8 that he had every intent of denying a grievance filed by Garza in October
2011.

9 Claim G: "2004 School Resource Officer Position Claim" for Capt.
10 Schneider, Lieut. Merryman and Lieut. Belles' scheming in 2004 to deny
Garza appointment to that position.

11 Claim H: "2009 Overtime Limitation Claim" for Belles' issuing a directive
12 limiting overtime in February 2009.

13 Claim I: "2010 Leaving Training Session Claim" for Seely's having made a
14 complaint about Garza's leaving a training session early resulting in a July
2010 reprimand and an entry in his 2011 evaluation.

15 Claim J: "2011 Personal Use of a Department Vehicle Claim" for Belles'
16 and Copeland's retaliation against Garza in August 2011 by initiating an
investigation and imposing a verbal reprimand for Garza's asking an on-duty
17 police officer to transport purchased shrubs for him using a Department
vehicle.

18 Claim K: "2011 Retaliatory Complaint Claim" for Seely and Wisner's
19 having filed a complaint in April 2011 against Garza in retaliation for an
earlier discrimination and hostile work environment complaint filed by
20 Garza in April 2011 against Seely.

1 Claim L: “2011 Brady List Placement Claim” against the City for placing
2 Garza on a Brady list in December 2011 prior to the conclusion of Garza’s
3 grievance and arbitration hearing challenge to discipline imposed against
4 Garza over inaccuracies in Garza’s February 16, 2011, search warrant
5 affidavit.

6 Claim M1: “2011 Disparate Discipline/Claim” against the City for other
7 non-Hispanic officers not being similarly disciplined for conduct similar to
8 that engaged in by Garza.

9 Claim M2: “2011 Disparate Brady List Inclusion Claim” against the City for
10 other non-Hispanic officers not being placed on the Brady list for dishonest
11 conduct.

12 Claim N: Unalleged “Accusation of Dishonesty Claim” arising out of
13 testimony Copeland gave in an April 2013 arbitration proceeding which
14 post-dates the filing of the complaint.

15 Claim O: Unalleged “2011 News Report Claim” against the City for
16 cooperating in a December 8, 2011 negative news report about Garza.

17 Claim P: Unalleged “2012 Facebook Posting Claim” against the City for
18 failing to address an objectionable June 2012 Facebook posting by Officer
19 Wisner.

20 Claim Q: Unalleged “1999 Sergeant’s Examination Claim” for 13 years’
worth of increased wages beginning in 1999 (\$84,500) had Garza taken and
passed the sergeant’s exam in 1999; Garza claims his plans were disrupted
because of the 1999 investigation and resulting grievance and 2000
arbitration proceeding.

Claim R: Unalleged “1999 Removal from Narcotics Unit Claim” for three
years loss of specialty overtime pay from 1999 to 2001 (\$45,000) for having
been wrongfully removed from the narcotics unit as a consequence of the
1999 investigation and resulting grievance and arbitration proceeding, even
though he requested, but the arbitrator declined to award, reinstatement to
the narcotics unit.

1 Claim S: Unalleged “2011 Retaliatory Shutdown of Narcotics Unit Claim”
2 for three years of lost specialty overtime pay (\$45,000) over Copeland’s
3 allegedly dismantling the narcotics unit in August 2011 in retaliation for
4 Garza having filed a complaint against YPD supervisors.

5 ECF No. 50 at 23-26 (parenthetical remarks omitted).

6 DISCUSSION

7 A. Legal Standard

8 Summary judgment may be granted to a moving party who demonstrates
9 “that there is no genuine dispute as to any material fact and that the movant is
10 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party
11 bears the initial burden of demonstrating the absence of any genuine issues of
12 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then
13 shifts to the non-moving party to identify specific genuine issues of material fact
14 which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
15 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the
16 plaintiff’s position will be insufficient; there must be evidence on which the jury
17 could reasonably find for the plaintiff.” *Id.* at 252.

18 For purposes of summary judgment, a fact is “material” if it might affect the
19 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
20 such fact is “genuine” only where the evidence is such that a reasonable jury could
find in favor of the non-moving party. *Id.* In ruling upon a summary judgment

1 motion, a court must construe the facts, as well as all rational inferences therefrom,
2 in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372,
3 378 (2007). Only evidence which would be admissible at trial may be considered.
4 *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002).

5 Before considering Defendant's contentions substantively, the Court notes
6 that Defendant's motion for summary judgment is partial and concerns only certain
7 facts, which it refers to as "claims." Plaintiff contends that Defendant's motion is
8 more like a statute of limitations motion to dismiss or a motion in limine, arguing
9 that the summary judgment standard does not apply. ECF No. 58 at 2. The Court
10 agrees that Defendant's motion serves a function similar to a motion in limine,
11 refining issues, claims and admissible evidence in preparation for another
12 dispositive motion or trial. It is properly being used to narrow the issues.

13 **B. State Law Claims**

14 **1. Whether Garza's Claims Are Time Barred**

15 Defendant first contends that Garza failed to timely file a pre-suit state tort
16 claim containing an adequate description of the state discrimination claims being
17 asserted under RCW 49.60. ECF No. 50 at 10. Defendant argues because Plaintiff
18 filed the tort claim form on January 14, 2013, and the lawsuit on March 22, 2013,
19 Plaintiff can only recover for actions occurring on or after January 14, 2010. ECF
20 No. 50 at 10-11. Plaintiff counters that not all acts occurring prior to January 14,

1 2010, are barred due to the continuing violations theory, and because prior claims
2 may be admissible as relevant background evidence to put timely claims in
3 context. ECF No. 58 at 3.

4 Plaintiff's Amended Complaint alleges discrimination on the basis of race in
5 violation of RCW 49.60.180 and retaliation in violation of RCW 49.60.210. ECF
6 No. 2 at 8-9. The WLAD provides that "[i]t is an unfair practice for any
7 employer...To discriminate against any person in compensation or in other terms
8 or conditions of employment because of age, sex, marital status, sexual orientation,
9 race, creed, color, national origin...." RCW 49.60.180. Washington's Law Against
10 Discrimination ("WLAD"), chapter 49.60 RCW does not contain its own
11 limitations period; discrimination claims must be brought within three years under
12 the general three-year statute of limitations for personal injury. *Antonius v. King*
13 *County*, 153 Wash.2d 256, 262-63 (2004).

14 Plaintiff contends that the continuing violation doctrine applies under
15 Washington law. ECF No. 58 at 13. The Court disagrees. Though Washington
16 courts once recognized the continuing violation doctrine,² the Washington
17

18 ² See, e.g., *Washington v. Boeing Co.*, 105 Wash.App. 1, 8-9 (2000) ("The
19 continuing violation doctrine creates an equitable exception to RCW 49.60's statute
20 of limitations when discriminatory conduct is ongoing. The doctrine allows a

1 Supreme Court made clear that it was rejecting the continuing violation doctrine in
2 light of the United States Supreme Court's holding in *Nat'l R.R. Passenger Corp.*
3 *v. Morgan*, 536 U.S. 101 (2002). As discussed at greater length below, *Morgan*
4 held that in the Title VII context, the continuing violation doctrine does not apply
5 to discrete acts of discrimination, only to hostile work environment claims. *Id.* at
6 112 (“[D]iscrete discriminatory acts are not actionable if time barred, even when
7 they are related to acts alleged in timely filed charges.”). The Washington Supreme
8 Court examined *Morgan* at length in a WLAD case, rejecting the continuing
9 violation doctrine and adopting *Morgan*'s analysis for liability on hostile work
10 environment claims. *Antonius*, 153 Wash.2d at 269-70 (2004).

11 Because the continuing violation doctrine does not apply, and because
12 Plaintiff's counsel at oral argument reiterated that there was no hostile work
13 environment claim, the three-year statute of limitations applies to the discrete acts
14 on which Plaintiff bases his claims. Plaintiff filed his tort claim with the city on
15 January 14, 2013; accordingly, only those acts occurring on or after January 14,
16 2010, may be considered as giving rise to liability for the WLAD claims. As
17 Defendant argues, the following acts are therefore barred: the 2008 accusation of
18 lying claim (A); 1999 evaluation claim (B); 2001-2002 exclusion from narcotics
19 plaintiff to allege otherwise time-barred discriminatory acts and recover damages
20 based on those acts.”).

1 unit claim (C); 2008 narcotics unit claim (D); 2008 wrong interview scores claim
2 (E); 2004 school resource officer position claim (G); 2009 overtime limitation
3 claim (H); the unalleged 1999 sergeant's examination claim (Q); and the unalleged
4 1999 removal from narcotics unit claim (R).

5 2. Whether Some of Garza's Claims Are Barred Because They Were Not
6 Included in the Tort Claim Form

7 Defendant also argues that some claims are barred because they were not
8 included in the tort claim form filed with the city, and that Plaintiff did not
9 sufficiently identify his damages on the tort claim form. ECF No. 50 at 11. Plaintiff
10 counters that several of the facts cited by Defendant were in fact on the tort claim
11 form, and that the city tort claim alleged sufficient facts to survive, as they all fall
12 under the general claim of race discrimination and retaliation. ECF No. 58 at 4.

13 Claims for damages against local government entities are subject to certain
14 claim filing requirements. *Blair v. Washington State University*, 108 Wash.2d 558,
15 577 (1987). All claims for damages against a local government entity must be
16 presented to an appointed agent within the applicable period of limitations and are
17 deemed presented when a standard tort claim form is delivered to the agent. RCW
18 4.96.020(2), (3). According to the statute, the claim form must at a minimum
19 require certain information. *Id.* "The laws specifying the content for such claims
20 shall be liberally construed so that substantial compliance therewith will be

1 deemed satisfactory.” RCW 4.96.010(1). The substantial compliance rule has two
2 necessary conditions:

3 First, there must be a sufficient bona fide attempt to comply with the
4 law, notwithstanding the attempt is defective in some particular.
5 Second, the attempt at compliance must actually accomplish the
6 statutory purpose, which is to give the governmental entity such
7 notice as will enable it to investigate the cause and character of the
8 injury.

9 *Renner v. City of Marysville*, 145 Wash.App. 443, 451-52 (2008), *aff’d*, 168
10 Wash.2d 540 (2010). Furthermore, “[r]equired information that is totally absent
11 from the claim cannot be supplied by any method of construction, however
12 liberal.” *Id.* (internal quotation omitted). As the Washington Supreme Court
13 explained:

14 While we recognize that the statute sets forth a substantial compliance
15 standard for the content of a claim, we must apply the Legislature's
16 liberal construction directive in a manner that promotes the purpose of
17 the claim filing statutes. It is generally accepted that one of the
18 purposes of the claim filing provisions is to allow government entities
19 time to investigate, evaluate, and settle claims. . . . The Legislature did
20 not intend that RCW 4.96.010 be applied to mean that the content of a
claim should be read so broadly as to negate the purpose of RCW
4.96.020(4), and we decline to do so.

17 *Medina v. Pub. Util. Dist. No. 1 of Benton Cnty.*, 147 Wash.2d 303, 310 (2002).

18 In 2009, the legislature added a fifth section to RCW 4.96.020. “With
19 respect to the content of claims under this section and all procedural requirements
20 in this section, this section must be liberally construed so that substantial

1 compliance will be deemed satisfactory.” RCW 4.96.020(5). According to the
2 House Bill Report, the stated position in favor of the amendment indicated, in part:

3 Injured plaintiff's claims are being denied because of the strict claim
4 filing statutes. The original intent of the statutes was to provide notice
5 so that the government can get the facts of the claim and investigate.
6 They were not meant to be “gotcha” statutes. Some of the procedural
7 requirements are tricky. Cases are being dismissed based on technical
8 interpretations of the statute. The bill is aimed at restoring the original
9 intent. It corrects historical unfairness and makes the statute
10 functional. It requires notice to the government, but eliminates the
11 barnacles of judicial bureaucracy.

12 H.B. Rep. on Engrossed Substitute H.B. 1533, at 4, 61st Leg., Reg. Sess.
13 (Wash. 2009); *see Myles v. Clark County*, 170 Wash.App. 521, 532 (2012).

14 Here, Plaintiff filed a tort claim with the City of Yakima pursuant to the
15 statute on January 14, 2013. ECF No. 52 at 4. Where the form asked for details
16 such as names and the cause of injury, Plaintiff referred to the attached EEOC
17 Intake Questionnaire. *Id.* at 4-5. The intake questionnaire details events giving rise
18 to Plaintiff’s claim of discrimination. The Court cannot find support in the
19 authorities Defendant cites for dismissing certain “claims”/facts from Plaintiff’s
20 case because not all of them were detailed in the form. *See Caron v. Grays Harbor*
County, 18 Wash.2d 397 (1943) (claim form failed to describe the specific basis of
the action against the County); *Blatt v. Shove*, 2014 WL 498007 (W. D. Wash.
2014) (claim form identifying city did not extend to unidentified acts of court
officers); *Medina*, 147 Wash.2d 303 (tort claim for *property damage* not sufficient

1 to preserve claim for *personal injury* from same accident.). These cases require the
2 city to be able to investigate the charges against it, which it could arguably not do
3 if the cause of action changed, or where the specific basis was not described, or
4 where it did not identify the responsible actor. Plaintiff's attachment to the form
5 identifies actors as well as some of the times and places giving rise to the alleged
6 discrimination. He made a demand for a sum certain. Under the statute's generous
7 standard, Plaintiff appears to have sufficiently given notice of the alleged
8 discrimination.

9 C.Federal Law Claims

10 1. Whether the Acts Alleged Are Time Barred

11 With respect to Plaintiff's federal law claims, Defendant argues that many of
12 the acts Plaintiff alleges cannot give rise to liability because they occurred outside
13 of the 300-day limitations period for the EEOC complaint. ECF No. 50 at 15.
14 Plaintiff counters that the conduct complained of in his complaint is part of a
15 continuing pattern of adverse action and is admissible as a whole.

16 "[D]iscrete discriminatory acts are not actionable if time barred, even when
17 they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp.*
18 *v. Morgan*, 536 U.S. 101, 112 (2002). As the Court explained:

19 Each discrete discriminatory act starts a new clock for filing charges
20 alleging that act. The charge, therefore, must be filed within the 180–
or 300–day time period after the discrete discriminatory act occurred.
The existence of past acts and the employee's prior knowledge of their

1 occurrence, however, does not bar employees from filing charges
2 about related discrete acts so long as the acts are independently
3 discriminatory and charges addressing those acts are themselves
timely filed. Nor does the statute bar an employee from using the prior
acts as background evidence in support of a timely claim.

4 *Id.* at 113. Thus, *Morgan* makes clear that claims based on discrete acts are only
5 timely where such acts occurred within the limitations period. Nor can a plaintiff
6 challenge conduct occurring prior to the limitations period merely by alleging that
7 the conduct was undertaken pursuant to a policy that was still in effect during the
8 limitations period. *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003).
9 This reasoning closes off Plaintiff's argument that the acts constitute "continuing
10 violations." As the Ninth Circuit explained:

11 In *Morgan*, however, the Supreme Court substantially limited the
12 notion of continuing violations: "discrete discriminatory acts are not
13 actionable if time barred, even when they are related to acts alleged in
14 timely filed charges." *Morgan*, 536 U.S. at 122, 122 S.Ct. 2061. In
15 specifically rejecting the application of the continuing violations
doctrine to what the Employees now characterize as a "serial
violation," the Court explained that "[e]ach discrete discriminatory act
starts a new clock for filing charges alleging that act." *Id.*

16 *Cherosky*, 330 F.3d at 1246 (noting that the Supreme Court identified the
17 following examples within the meaning of the term "discrete discriminatory act":
18 "termination, failure to promote, denial of transfer, or refusal to hire.")

19 The Supreme Court also carved out an exception to the rule that all
20 discriminatory acts can only arise from acts occurring in the limitations period for

1 hostile environment claims on grounds that “[t]heir very nature involves repeated
2 conduct.” *Morgan*, 536 U.S. at 115. Thus, “[p]rovided that an act contributing to
3 the claim occurs within the filing period, the entire time period of the hostile
4 environment may be considered by a court for the purposes of determining
5 liability.” *Id.* at 117.

6 Here however, Plaintiff’s counsel conceded at oral argument that there was
7 no claim for hostile work environment, so that exception to the discrete acts rule
8 does not apply. Thus, the alleged discriminatory acts occurring before the EEOC
9 limitations period cannot give rise to liability. Plaintiff filed the EEOC Intake
10 Questionnaire³ on April 9, 2012 (ECF No. 60-1 at 7-15), so only Title VII claims
11 alleged to have occurred on or after June 14, 2011, are timely. The statute
12 however, does not bar reference to those other acts as background evidence in
13 support of a timely claim. Accordingly, the Court grants Defendant’s motion
14 insofar as it requests a finding that Defendant cannot be held liable based on

15
16 ³ Despite Defendant’s claim to the contrary, the Intake Questionnaire is considered
17 by the EEOC as a “charge.” The form itself provides as much. *See* ECF No. 60-1
18 at 11; *and see Federal Express Corp. v. Holowecki*, 552 U.S. 389, 404 (2008) (a
19 filing is deemed a charge if the document reasonably can be construed to request
20 agency action and appropriate relief on the employee's behalf).

1 alleged discriminatory acts occurring before the EEOC limitations period. This
2 includes “claims” A, B, C, D, E, G, H, I, Q, and R.

3 2. Whether Garza Properly Exhausted His Claims with the EEOC

4 Defendant next argues that Garza’s EEOC questionnaire and unsigned
5 statement do not constitute an EEOC charge for purposes of determining if
6 Plaintiff has properly exhausted his administrative claim, and that Garza is limited
7 to the allegations contained in the verified EEOC charge. ECF No. 50 at 16; ECF
8 No. 61 at 1. Plaintiff responds that the Court should also consider allegations
9 contained in the EEOC intake questionnaire, noting that the EEOC drafted the
10 factual allegations in the charge based on the intake information. ECF No. 58 at 9;
11 ECF No. 59 at 37. Defendant replies that an unverified EEOC intake form cannot
12 constitute an EEOC “charge” for purposes of Title VII.

13 Plaintiff’s Amended Complaint alleges discrimination in violation of Section
14 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) and retaliation in violation of § 2000e-
15 3. ECF No. 2 at 8. To establish subject matter jurisdiction over the Title VII claim,
16 Plaintiff must exhaust his administrative remedies. *B.K.B. v. Maui Police Dep’t*,
17 276 F.3d 1091, 1099 (9th Cir. 2002). As the Ninth Circuit explained:

18 Under Title VII, a plaintiff must exhaust her administrative remedies
19 by filing a timely charge with the EEOC, or the appropriate state
20 agency, thereby affording the agency an opportunity to investigate the
charge. 42 U.S.C. § 2000e-5(b). “The administrative charge
requirement serves the important purposes of giving the charged party

1 notice of the claim and ‘narrow[ing] the issues for prompt
2 adjudication and decision.’ ”

3 *B.K.B.*, 276 F.3d at 1099. Defendant cites the Fourth Circuit for the proposition
4 that “the factual allegations made in formal litigation must correspond to those set
5 forth in the administrative charge.” *Chacko v. Patuxent Institution*, 429 F.3d 505,
6 509 (4th Cir. 2005). However, in the Ninth Circuit, “[t]he EEOC's failure to
7 address a claim asserted by the plaintiff in her charge has no bearing on whether
8 the plaintiff has exhausted her administrative remedies with regard to that claim.”

9 *B.K.B.*, 276 F.3d at 1099 (“A Title VII complainant is not charged with the
10 commission’s failure to perform its statutory duties.” (internal quotations
11 omitted)). Rather, the *B.K.B.* court indicated that in determining whether a plaintiff
12 has exhausted allegations that he did not specify in his administrative charge,

13 it is appropriate to consider such factors as the alleged basis of the
14 discrimination, dates of discriminatory acts specified within the
15 charge, perpetrators of discrimination named in the charge, and any
16 locations at which discrimination is alleged to have occurred. In
17 addition, the court should consider plaintiff's civil claims to be
18 reasonably related to allegations in the charge to the extent that those
19 claims are consistent with the plaintiff's original theory of the case.

20 *Id.* at 1100. Furthermore,

Even when an employee seeks judicial relief for claims not listed in
the original EEOC charge, the complaint “nevertheless may
encompass any discrimination like or reasonably related to the
allegations of the EEOC charge.” **Although allegations of
discrimination not included in a plaintiff's EEOC charge
generally may not be considered by a federal court, subject
matter jurisdiction extends over all allegations of discrimination**

1 **that either “fell within the scope of the EEOC's *actual***
2 **investigation or an EEOC investigation which *can reasonably be***
3 ***expected to grow out of the charge of discrimination.*”**

4 We “consider [a] plaintiff's civil claims to be reasonably related to
5 allegations in the charge to the extent that those claims are consistent
6 with the plaintiff's original theory of the case.”

7 *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (internal
8 citations omitted) (bold emphasis added).

9 Even the case Defendant cites, *Chacko*, cited as an example a case in which
10 a Plaintiff’s “charge alleges discrimination on one basis—such as race—and he
11 introduces another basis in formal litigation—such as sex,” 429 F.3d at 509, not
12 simply factual allegations that go to the same overall basis of litigation. Like the
13 Ninth Circuit, the Fourth Circuit explained that “[a] Title VII plaintiff can of
14 course exhaust administrative remedies if a reasonable investigation of his
15 administrative charge would have uncovered the factual allegations set forth in
16 formal litigation.” *Id.* at 512.

17 Here, as the EEOC letter to Garza indicates, the charge “is a summary of
18 [Garza’s] claims based on the information [he] provided.” ECF No. 60-1 at 40. As
19 the Ninth Circuit suggested, it would be unfair to deprive Plaintiff of his right to
20 sue simply because the EEOC inaccurately summarized the scope of his allegations
 against his employer. Thus, the Court looks to whether the charges are reasonably
 related to the subsequent allegations.

1 Defendant also contends the unverified intake questionnaire is inoperative
2 but overlooks the controlling regulation that provides, in relevant part:

3 A charge may be amended to cure technical defects or omissions,
4 including failure to verify the charge, or to clarify and amplify
5 allegations made therein. Such amendments and amendments alleging
6 additional acts which constitute unlawful employment practices
7 related to or growing out of the subject matter of the original charge
8 will relate back to the date the charge was first received.

9 29 C.F.R. § 1601.12(b). Under this provision, a complainant who files an unsigned
10 or unsworn charge can amend the charge by providing a supplemental verification
11 and that amendment relates back to the original charge so as to satisfy the “oath or
12 affirmation” requirement. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115-18
13 (2002). This is exactly what happened here. *See* ECF No. 60-1 at 43-46.

14 The charge that the EEOC sent Defendant states that Garza is “employed as
15 a police officer”; “was placed on administrative leave in September 2011,
16 investigated, then suspended in October 2011”; “received unfavorable and
17 inappropriate negative comments on [his] performance appraisal conducted in
18 approximately December 2011”; and that he believes that “these actions were due
19 to [his] race, [his] national origin, and retaliation for having opposed employment
20 discrimination in the past...” ECF No. 60-1 at 42. Defendant alleges that this
charge does not encompass claims A, B, C, D, E, F, G, H, I, J, K, L, M2, N, O, P,
Q, R, and S and these claims should therefore be dismissed. ECF No. 50 at 18-19.

1 As noted above, the Court finds that “claims” A, B, C, D, E, G, H, I, Q, and R are
2 time-barred and thus cannot give rise to liability for Plaintiff’s Title VII claims.

3 Thus, the Court need only consider “claims” F, J, K, L, M2, N, O, P, and S.

4 Plaintiff concedes that claims N, O, P, Q, R, and S are not claims at all, they
5 are only “pieces of evidence” “to be relied upon to prove a claim.” ECF No. 58 at
6 18. Accordingly, the Court confirms that no liability may independently attach to
7 these factual allegations.

8 Claims F, J, K, L, and M2 all allegedly occurred within the period leading
9 up to Garza’s investigation and suspension in late 2011. Furthermore, these claims
10 are “reasonably related” to Plaintiff’s theory of the case and allegations emanating
11 from his initial intake questionnaire.

12 **D. Breach of Promises of Specific Treatment**

13 Defendant argues that certain claims are barred by the three-year statute of
14 limitations: A, B, C, D, E, G, H, Q, and R. ECF No. 50 at 19-20. At oral argument,
15 Plaintiff agreed that the three-year statute of limitations applies to these claims.
16 Plaintiff filed his complaint on March 22, 2013; accordingly, only those acts
17 occurring on or after March 22, 2010, may be considered as giving rise to liability
18 for breach of promises of specific treatment. Accordingly, “claims” A, B, C, D, E,
19 G, H, Q, and R are time-barred. Of course, “claims” Q and R are concededly not

1 claims, but rather “pieces of evidence” “to be relied upon to prove a claim.” *See*
2 *above*.

3 **E. Failure to Allege Claims in the Complaint**

4 Defendant argues that “claims” N, O, P, Q, R, and S should be ordered “not
5 part of the current lawsuit” because Plaintiff did not allege them in his complaint,
6 contending that a plaintiff cannot assert unalleged claims in opposition to a motion
7 to dismiss or summary judgment motion as a shortcut for amending his complaint.
8 ECF No. 50 at 20.

9 As the Court observed above, Plaintiff concedes that claims N, O, P, Q, R,
10 and S are not claims at all, they are only “pieces of evidence” “to be relied upon to
11 prove a claim.” ECF No. 58 at 18.

12 The Court observes that Plaintiffs are not required to set out in the complaint
13 all the facts necessary to prosecute their cases throughout litigation. Rather, the
14 pleading requirements are governed by Fed. R. Civ. P. 8(a)(2), *Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678
16 (2009). A complaint must contain a “short and plain statement of the claim
17 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). There must
18 be “enough facts to state a claim to relief that is plausible on its face.” *Twombly*,
19 550 U.S. at 570. This standard “does not require detailed factual allegations, but it

1 demands more than an unadorned, the defendant-unlawfully-harmed-me
2 accusation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

3 Accordingly, the Court confirms that no liability may independently attach
4 to these factual allegations.

5 **ACCORDINGLY, IT IS HEREBY ORDERED:**

6 Defendant’s Motion for Summary Judgment (ECF No. 50) is **DENIED** in
7 part and **GRANTED** in part.

- 8 1. Defendant’s request, based upon the statute of limitations, to exclude
9 liability based on Plaintiff’s state tort law claims occurring before
10 January 14, 2010, are **GRANTED** with respect to claims A, B, C, D, E,
11 G, H, Q, and R.
 - 12 2. Defendant’s request to exclude acts on grounds that they were not
13 properly identified on the tort claim form is **DENIED**.
 - 14 3. Defendant’s request to exclude liability for the acts described in “claims”
15 A, B, C, D, E, G, H, I, Q, and R from consideration under Plaintiff’s
16 federal law claims is **GRANTED**.
 - 17 4. Defendant’s request to exclude liability for certain acts because they were
18 not included in the EEOC charge is **GRANTED** with respect to “claims”
19 N, O, P, Q, R, and S.
- 20

1 5. Defendant's request to exclude liability based on allegations as not
2 falling within the three-year statute of limitations for breach of promises
3 of specific treatment is **GRANTED** with respect to claims A, B, C, D, E,
4 G, H, Q, and R.

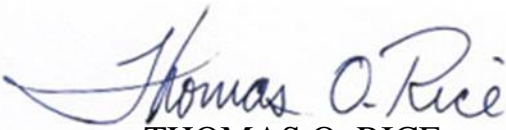
5 6. Defendant's request to exclude liability based on factual allegations not
6 alleged in the complaint is **GRANTED** with respect to allegations N, O,
7 P, Q, R, and S.

8 7. As indicated herein, these rulings do not necessarily bar reference to
9 those other acts as background evidence in support of a timely claim.

10 The District Court Executive is hereby directed to enter this Order and
11 provide copies to counsel.

12 **DATED** June 2, 2014.




THOMAS O. RICE
United States District Judge